78-1354

IN THE

# Supreme Court of the United States



October Term, 1978
No. ....., Misc.

JOHN W. KLUGE,

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (YOLANDA G. KLUGE, Real Party In Interest),

Respondent.

**Petition for Writ of Certiorari to the Court of Appeal of the State of California for the Second District.**

ROBERT S. WARREN,
RICHARD CHERNICK,
515 South Flower Street,
Los Angeles, Calif. 90071,
*Counsel for Petitioner.*

BRENT A. WHITTLESEY,
GIBSON, DUNN & CRUTCHER,
*Of Counsel.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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*vs.*

YOLANDA G. KLUGE,

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**Petition for Writ of Certiorari to the Court of Appeal of the State of California for the Second District.**

Petitioner John W. Kluge, a resident of the State of New York, respectfully prays that a Writ of Certiorari issue to review an order of the Court of Appeal of the State of California for the Second District refusing to issue its writ of mandamus following an order of the Superior Court overruling his motion to quash service of the summons and complaint by reason of lack of personal jurisdiction over him in an action brought in the Superior Court by his former wife, who is presently a resident of the State of California.

The decision of the Court of Appeal, which is contrary to this Court's recent decision in *Kulko v. Superior Court of the State of California,* 436 U.S. 84 (1978), asserts jurisdiction over petitioner in a forum where he does not reside. That assertion of jurisdiction is based upon alleged "minimum contacts" between petitioner and California, which may not, under applicable California and federal authorities, be considered for the purpose of assessing jurisdiction.

**Opinions Below.**

The Superior Court issued a brief Minute Order opinion in connection with denial of petitioner's motion to quash service of summons and complaint, which minute order appears in the Appendix hereto at Page A-1. The Court of Appeal of the State of California, Second District, issued an opinion summarily denying petitioner's Petition for Writ of Mandate on December 7, 1978. The opinion of the Court of Appeal appears in the Appendix hereto at Page A-3. Thereafter, the Supreme Court of the State of California summarily denied petitioner's Petition for Hearing.[1] (Appendix, A-4.) Petitioner has been ordered by the Superior Court to answer the complaint in this matter by March 4, 1979.

**Jurisdiction.**

The judgment of the Court of Appeal of the State of California was entered on December 7, 1978. (Appendix A-3.) This Petition for Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this Court to review the case on Petition for Writ of Certiorari rests upon 28 U.S.C. § 1257(3); the judgment of the Court of Appeal requiring the assertion of California jurisdiction over petitioner is "fundamental to the further conduct of the case"[2] and immediate

[1]The judgment of the California courts is now a "final" one with respect to the question of jurisdiction, since petitioner has exhausted all available appellate remedies within the state court system in challenging jurisdiction. (See Cal. Code Civ. Proc., § 418.10; *Shaffer v. Heitner*, 433 U.S. 186, 195-196, n.12 (1977); *Gen. Council on Finance, etc. v. Superior Court of California*, 439 U.S. ....., Slip. Op., at 3 (No. A-200, Sep. 1, 1978) (Rehnquist, J., in chambers); *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942).)

[2]*Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 (1947).



resolution of the constitutional issue at stake is essential to vindicate the rights of petitioner.[3]

**Question Presented.**

May California's courts constitutionally assert jurisdiction over a non-resident defendant based upon contacts with California which consist largely of:

1. Acts committed in this state by *respondent* rather than petitioner which can provide no basis for jurisdiction over defendant (*Hanson Denckla*, 357 U.S. 235, 253 (1958); *Cornell University Medical College v. Superior Court*, 38 Cal.App. 3d 311, 316, 113 Cal.Rptr. 291, 294 (1974));

2. Acts performed by petitioner in connection with his business obligations as chief executive officer of Metromedia, Inc. and which, consequently, may not provide a legal basis for assertion of personal jurisdiction over him in this state (*Flick v. Exxon Corp.*, 58 Cal.App.3d 212, 219, 129 Cal.Rptr. 760, 767 (1976); *Arnesen v. Raymond Lee Organization, Inc.*, 31 Cal.App.3d 991, 996, 107 Cal.Rptr. 744, 747 (1973); *Cornelison v. Chaney*, 16 Cal.3d 143, 127 Cal.Rptr. 352 (1976)); or

3. Contacts between petitioner and his wife and children within this state which, as a matter of public policy, may not be used by the courts of California to provide a basis for jurisdiction over petitioner (*Kulko v. Superior Court, supra*, 436 U.S. 84, 96-96)?

[3]*See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485-487 (1975).

**Constitutional Provisions, Statutes and Rules Involved.**

The applicable constitutional provisions involved are the Fifth Amendment[4] and Fourteenth Amendment[5] to the United States Constitution. The California statute which constituted the state law predicate for the assertion of jurisdiction was Section 410.10 of the California Code of Civil Procedure.[6] Petitioner's motion to quash service of summons and complaint was made pursuant to § 418.10(a) of the California Code of Civil Procedure.[7]

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[4]"Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[5]"Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the juridiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *"

[6]"A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Code Civ. Proc. § 410.10.

[7]"(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:



**Statement of the Case.**

This litigation involves an attack by respondent upon a marital separation agreement entered into in the State of New York, as well as a decree of divorce obtained by respondent in Santo Domingo, Dominican Republic. Respondent has attempted to litigate her claims in California on the basis of this state's "long

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(1) To quash service of summons on the ground of lack of jurisdiction of the court over him.

(2) To say or dismiss the action on the ground of inconvenient forum.

"(b) Such notice shall designate, as the time for making the motion, a date not less than 10 nor more than 20 days after filing of the notice. The service and filing of the notice shall extend the defendant's time to plead until 15 days after service upon him of a written notice of entry of an order denying his motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days.

"(c) If such motion is denied by the trial court, the defendant, within 10 days after service upon him of a written notice of entry of an order of the court denying his motion, or within such further time not exceeding 20 days as the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action. The defendant shall file or enter his responsive pleading in the trial court within the time prescribed by subdivision (b) unless, on or before the last day of his time to plead, he serves upon the adverse party and files with the trial court a notice that he has petitioned for such a writ of mandate. The service and filing of such notice shall extend his time to plead until 10 days after service upon him of a written notice of the final judgment in the mandate proceeding. Such time to plead may for good cause shown be extended by the trial court for an additional period not exceeding 20 days.

"(d) No default may be entered against the defendant before expiration of his time to plead, and no motion under this section, or under Section 473 or 473.5 when joined with a motion under this section, or application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant." Cal. Code Civ. Proc. § 418.10.

arm" jurisdiction statute by serving her former husband, a resident of New York State, personally and by mail in New York. Respondent's declarations and other papers filed in opposition to the motion to quash in the trial court all contended that petitioner was, at the time of the divorce, a resident of California. Petitioner presented overwhelming evidence to the contrary, which led the Superior Court explicitly to base its assertion of jurisdiction on grounds other than residence.

> "Court finds that defendant Kluge has substantial contacts in California as to marital relations, as to parental relations and others. The limited holding of *Kulko v. Superior Court* (1978) ..... U.S. ....., 56 L.Ed.2d 132 is not applicable but the broader U.S. Supreme Court decision of *International Shoe Company v. Washington* (1945) 326 U.S. 310, *Hanson v. Denckla* (1958) 357 U.S. 235 and *Shaffer v. Heitner* (1977) 433 U.S. 186 are applicable. There are substantial contacts and in the interest of justice, fairness and due process compel a finding that this court has jurisdiction. *The court does not make a determination of defendant's residence or domicile.*" Appendix A-1, A-2.

Accordingly, residence is not a factor which may provide an adequate basis for jurisdiction over petitioner in this litigation. If jurisdiction exists at all, it must be on the basis of other facts. Yet the other "contacts" between petitioner and California consist only of acts committed in California by *respondent* rather than petitioner, acts performed by petitioner in connection with his business obligations, or contacts between petitioner and his wife and children in California. For reasons which will be explained fully below, none of these



purported "contacts" between petitioner and the State of California may properly be considered in establishing jurisdiction over him.

The Superior Court received a great deal of evidence in connection with the hearing on petitioner's motion to quash in the form of declarations and affidavits. The following is a summary of the facts presented to that court.[8]

Petitioner John W. Kluge and Yolanda Galardo were married in 1969 in Connecticut. Shortly before their marriage, they entered into an antenuptial agreement in New York State, which agreement is attached as Exhibit 1 to the complaint. Thereafter they lived in New York, where they resided continuously until early 1976.

In 1976 Yolanda left New York and, after a short stay at the Beverly Wilshire Hotel, moved to a home purchased by petitioner on Hillcrest Road in Beverly Hills. The evidence introduced by the parties conflicts sharply over the reasons for this move. Petitioner's affidavit states that the move was initiated by Yolanda, in order to promote her acting career (a contention supported by the affidavits of other persons familiar with Yolanda's desire for an acting career). The house was, in petitioner's view, purchased by him to provide a suitable residence for his wife and daughter, Samantha. According to Yolanda, the Hillcrest Road house

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[8]The record before the California Court of Appeal in connection with petitioner's Petition for Writ of Mandamus consisted of approximately 300 pages of materials which had previously been filed in the Superior Court. Petitioner will, if requested by the Clerk of this Court, request that the Clerk of the California Court of Appeal certify and transmit that record to this Court pursuant to Rule 21(1) of this Court's Rules of Practice.

was purchased as a primary residence for the couple. She states that her acting career was nothing more than a hobby. By failing to resolve this conflict, the Superior Court has in effect found that Yolanda failed to carry her burden of proof that petitioner ever became a resident of California.

Petitioner's business responsibilities require that he travel extensively throughout the United States and in foreign countries. In 1976, when he travelled to Los Angeles on business, he would visit his wife and daughter at the Hillcrest Road house. During one of petitioner's trips to California in April, 1977, he and Yolanda discussed their marital difficulties. According to the affidavit of petitioner, his discussions were directed towards effecting a reconciliation with Yolanda. His contention is supported by the affidavit of John P. Lomenzo, who was present at the Hillcrest Road house during this period. According to Mr. Lomenzo's affidavit, petitioner asked him to come to the Hillcrest Road house either to achieve a reconciliation or to discuss details of an amicable, voluntary separation for a period of time in order for both parties to determine whether the marriage would or could continue. Yolanda's declaration asserts that John advised her of his desire for a marital separation on April 28, 1977 before they had even had an argument and denies that there was any discussion of a reconciliation.

The declarations of the parties and other witnesses are in substantial agreement, however, concerning the fact that certain discussions pertaining to the resolution of the marital relationship and disposition of marital property were conducted during the next several days in Beverly Hills, California. The declarations are also in agreement that the parties thereafter flew to New



York where petitioner and respondent consulted with their respective counsel prior to executing the separation agreement, which agreement is attached as Exhibit 2 to Yolanda's Complaint. Following execution of the separation agreement, Yolanda flew to Santo Domingo where, accompanied by Mr. Lomenzo, she obtained a decree of divorce on May 6, 1977.

Petitioner is not, and has never been, a resident of the State of California. As the Superior Court's minute order states, the assertion of jurisdiction over petitioner is based on contacts with California *other than residence*. Petitioner is, and has been at least since 1969, a resident of New York State.

Petitioner is employed by Metromedia, Inc. ("Metromedia"), a company which presently maintains its main corporate offices in New York and New Jersey (and formerly maintained such offices in New York City). Because of his position with Metromedia, petitioner is required to travel to numerous states, including California, on business. He has visited California perhaps a dozen times a year during the past several years. None of his trips to California in connection with his employment obligations concerned any of the substantive issues involved in this litigation.

Petitioner has, at least since 1969, personally owned no real property in California other than the Hillcrest Road house. A corporation of which petitioner is sole shareholder, however, owns a parcel of undeveloped real property in Los Angeles County which is held for investment purposes. At least since 1969, petitioner has never owned an automobile registered in the state. Nor has he ever voted or filed a personal income tax return in California.

Petitioner has only limited financial contacts with California. He has, for the past several years, maintained a small checking account at the United California Bank in connection with his business activities. Additionally, in 1976, petitioner established a joint checking account at United California Bank when Yolanda moved to Beverly Hills to provide funds for her support.

When facts which should not be considered by the court in assessing California's assertion of jurisdiction over petitioner are "peeled away" from respondent's factual presentation, any contacts remaining between petitioner and California are trivial. These inconsequential contacts which may appropriately be considered in assessing jurisdiction are far less than those which have previously been held to be insufficient to establish jurisdiction by appellate courts. (*Cf. Cornelison v. Chaney, supra,* 16 Cal.3d 143, 127 Cal.Rptr. 352; *Watson's Quality Turkey Products, Inc. v. Superior Court,* 37 Cal.App.3d 360, 112 Cal.Rptr. 345 (1974).)



## REASONS FOR GRANTING THE WRIT.

A writ of certiorari is sought from this Court on the grounds that:

1. The decision of the Court of Appeal ignores established due process principles as recently enunciated in *Kulko v. Superior Court, supra,* 436 U.S. 84.

2. The decision of the Court of Appeal denies petitioner his right to due process of law by asserting jurisdiction over him in a forum where assertion of jurisdiction is constitutionally impermissible.

### I

### THE ONLY CONTACTS BETWEEN PETITIONER AND CALIFORNIA WHICH ARE APPROPRIATE FOR CONSIDERATION IN CONNECTION WITH ASSERTION OF JURISDICTION OVER PETITIONER ARE INSUFFICIENT TO SATISFY THE CONSTITUTIONAL "MINIMUM CONTACTS" TEST.

California courts are invested by statute with jurisdictional authority as broad as is constitutionally permissible. (Cal. Code Civ. Proc. § 410.10.) It is now established that California courts may exercise two types of *in personam* jurisdiction, commonly referred to as "general" and "limited." Both types of *in personam* jurisdiction must be based upon the existence of "minimum contacts" between the defendant and the forum state. The distinction pertains primarily to the types of claims against the defendant which may be adjudicated in California courts. The California Supreme Court has defined the difference between general and limited jurisdiction in the following terms:

> "If a nonresident defendant's activities may be described as 'extensive or wide-ranging' (*Buckeye*

*Boiler Co. v. Superior Court* (1969) 71 Cal.2d 893, 898-899 [80 Cal.Rptr. 113, 458 P.2d 57]) or 'substantial . . . continuous and systematic' (*Perkins v. Benguet Mining Co., supra,* 342 U.S. 437, 447-448 [96 L.Ed. 485, 493-494]), there is a constitutionally sufficient relationship to warrant jurisdiction for all causes of action asserted against him. In such circumstances, it is not necessary that the specific cause of action alleged be connected with the defendant's business relationship to the forum.

"If, however, the defendant's activities in the forum are not so pervasive as to justify the exercise of general jurisdiction over him, then jurisdiction depends upon the quality and nature of his activity in the forum in relation to the particular cause of action. In such a situation, the cause of action must arise out of an act done or transaction consummated in the forum, or defendant must perform some other act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws." *Cornelison v. Chaney, supra,* 16 Cal.3d 143, 147-148.

The decision by the courts of California or any other state to assert jurisdiction over a non-resident defendant is, at root, one based on policy considerations. Decisions analyzing disparate factual situations can be harmonized by recognizing that the court must always determine whether assumption of jurisdiction under particular circumstances will promote certain beneficial policies of the substantive law. This concept has been enunciated explicitly in a number of decisions.



"The crucial inquiry [in determining whether to assert jurisdiction] concerns the character of defendant's activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and upon the *balancing of the convenience of the parties and the interests of the state in assuming jurisdiction.* [Citations]" *Cornelison v. Chaney, supra,* 16 Cal.3d 143, 148 (Emphasis added.)

Analysis of many applicable authorities supports this construction of California law. *Floyd J. Harkness Co. v. Amezcua,* 60 Cal.App.3d 687, 131 Cal.Rptr. 667 (1976), concerned an action by a California resident to enforce a series of promissory notes executed by defendant, a citizen of Mexico. The court found no constitutionally adequate basis for jurisdiction over the defendant in California, citing as one reason for its decision the adverse effect upon interstate commerce which would result from forcing persons in defendant's position to litigate in California:

"A further reason against the assumption of jurisdiction by California under the circumstances in the instant case is the adverse effect this may have on interstate commerce. To hold that a foreign individual who engaged in international and interstate commerce has subjected himself to the judicial jurisdiction of California by the mere act of agreeing to pay off promissory notes made payable in California and executed as evidence of moneys advanced by a California resident would hinder interstate business, contrary to the best economic interests of California. Grounding jurisdiction upon such a shadowy connection would cause borrowers from outside California to quickly seek

> alternative sources of funds rather than borrow money from this state's lenders and thereby subject themselves to the jurisdiction of this state. (See *Belmont Industries, Inc. v. Superior Court, supra,* 31 Cal.App.3d at p. 289.) This is particularly true where, as here, the California source of financing is merely collateral to the primary profit-seeking venture of the parties which is conducted wholly outside of this state." *Floyd J. Harkness Co. v. Amezcua, supra,* 60 Cal.App.3d 687, 694.

Obviously, the court in *Harkness* was concerned with an analysis far more subtle than a mere counting of the "contacts" between the defendant and California. Courts are, and should be, concerned with the effect that a decision to assert jurisdiction over the defendant in a particular case will have upon future dealings between non-residents and persons residing in that state. The test of jurisdiction is not a mechanical one. Rather, a decision to assert jurisdiction depends first on whether there are constitutionally adequate "minimum contacts" between the defendant and the state and secondly, whether assertion of jurisdiction is consistent with public policy.

### A. The Lower Court Considered Many Inappropriate Factual Matters in Assessing the "Contacts" Between Petitioner and California.

The Superior Court's minute order entered in response to petitioner's motion to quash is ambiguous with respect to the jurisdictional theory adopted by the court. It is impossible to determine whether that court believed that "general" jurisdiction existed over petitioner, or whether the court had "limited" jurisdiction to decide the issues raised by respondent's complaint. Regardless of the theory adopted by the lower court in asserting jurisdiction, it is apparent that the court relied upon several impermissible factual considerations in assessing the "contacts" between petitioner and California.



#### 1. Petitioner's Contacts With California Stemming From Performance of His Duties for Metromedia, Inc. May Not Be Considered for Purposes of Assessing Jurisdictional Contact.

Respondent's declaration filed in opposition to the motion to quash makes much of the fact that petitioner is the chief executive officer of a large public company, Metromedia. Metromedia, of course, has substantial business interests within the State of California and petitioner is present within the State of California on occasion in connection with the management of those business interests. Respondent relies upon these contacts of petitioner in large part in attempting to establish jurisdiction over him in this state.

Respondent's attempt is unavailing. In *Flick v. Exxon Corp., supra,* 58 Cal.App.3d 212, 129 Cal.Rptr. 760, plaintiffs brought a shareholders' derivative action against the company and its officers and directors. They contended that jurisdiction existed over the individual defendants because the company carried on substantial business activities within California and because a large number of shareholders resided in this state. Plaintiffs also pointed out that the individual directors were present in California at a shareholders' meeting and had made occasional trips to the state.

The court declined to exercise jurisdiction over either the company or the individual defendants, finding that it would be unfair to conduct the shareholders' deriva-

tive litigation in California. The court rejected plaintiffs' contention that any individual who serves as a director or officer of a corporation subjects himself to jurisdiction in a stockholders' derivative action in any state where a substantial number of that corporation's stockholders reside. (*Flick v. Exxon Corp., supra,* 58 Cal. App.3d 212, 219, 129 Cal.Rptr. 760, 765.) Rather, the court determined that, because of policy considerations, a non-resident defendant who is a director of a national company should not, as a matter of fairness, be subject to suit in every jurisdiction where his company has substantial business contact. In other words, it is unfair to subject a defendant to jurisdiction because his business activities require him to travel to the forum state. *Flick v. Exxon* concerned corporate litigation closely related to the position of the defendants as officers and directors. The rule developed in that case applies even more forcefully in a situation such as this, where the subject matter of the litigation has absolutely no relationship whatsoever to the defendant's business position and travel. (*See also Cornelison v. Chaney, supra,* 16 Cal.3d 143, 147-148, 127 Cal. Rptr. 352; *Arnesen v. Raymond Lee Organization, Inc., supra,* 31 Cal.App.3d 991, 996, 107 Cal.Rptr. 744, 747.) Federal authorities are consistent with California cases on this point. (*Insull v. New York World-Telegram Corp.,* 172 F.Supp. 615, 623 (N.D. Ill. 1959), cert. den. 362 U.S. 942 [corporate employee not subject to jurisdiction merely because his corporate employer would be].)

On the basis of these authorities it is unfair and contrary to due process requirements for the lower court to have relied upon any of petitioner's contacts with California as a result of his position with Metro-



media. The portions of respondent's declaration pertaining to petitioner's trips to this state in connection with the business activities of Metromedia, the time spent by the parties at hotel suites maintained by Metromedia while in this state for business reasons, the non-resident business membership maintained by Metromedia at the Hillcrest Country Club, and Metromedia's substantial holdings and business activities in this state must all be eliminated from consideration in assessing petitioner's contacts with this state.

**2. Acts Performed by Respondent in California Are Irrelevant in Assessing Whether Jurisdiction Exists Over Petitioner.**

A great deal of the factual information relied upon by respondent in opposing the motion to quash pertains to acts performed in California by respondent rather than petitioner. Such facts are simply irrelevant to the jurisdictional question. It is well established that it is only *defendant's* activities within this state that may be considered by the court in assessing the "contacts" necessary to establish jurisdiction. The point is illustrated by *Floyd J. Harkness Co. v. Amezcua, supra,* 60 Cal.App.3d 687, 131 Cal.Rptr. 667, 669. There plaintiffs contended that the fact that they were to receive repayment of defendant's obligation in California constituted a significant contact with the state which should be considered by the court in deciding the jurisdictional question. The court emphatically rejected this contention, noting that it was only the acts of the *defendant* in California which may be considered in the "minimum contacts" analysis. (*See also Republic International Corp. v. Amco Engineers, Inc.,* 516 F.2d 161, 165 (9th Cir. 1975); *Cornell University Medical College v. Superior Court, supra,* 38 Cal.App.3d 311, 316, 113 Cal.Rptr. 291, 294;

*Belmont Industries, Inc. v. Superior Court, supra,* 31 Cal.App.3d 281, 286, 106 Cal.Rptr. 237, 240.)

On the basis of these authorities, the portions of respondent's declaration devoted to recounting acts performed by respondent in California may not be considered in deciding the jurisdictional question. Such acts performed by respondent include her moving to California to pursue an acting career, bringing her daughter to California, enrolling her daughter in a local elementary school, selecting architects and supervising work on the Hillcrest Road house, receiving and spending a support allowance in California, discussing the separation agreement with her husband in Beverly Hills and returning to California after securing her Dominican divorce. These acts must receive no consideration in assessing the "minimum contacts" between California and petitioner.

**3. The Marital Discussions Carried on in California May Not Be Considered as "Contacts" Between Petitioner and California for Purposes of Assessing Jurisdiction.**

There is, of course, no dispute that petitioner visited his family on several occasions after his wife and daughter moved to California in 1976. There is also no dispute that petitioner came to California in April of 1977 and discussed with his former wife the terms of a separation agreement. This agreement was subsequently executed by the parties in New York City after consultation in New York with their respective counsel.

The Superior Court obviously placed great importance upon these visits to California since its assertion of jurisdiction was based upon a finding that



> "[d]efendant Kluge has substantial contacts in California as to *marital relations,* as to *parental relations* and others." (Appendix A-1.)

However, the court erred in considering petitioner's visits to California and other "family contacts" in California as a basis for assertion of jurisdiction over him.

This Court has recently provided substantial guidance on this question in an important case concerning the problem of *in personam* jurisdiction in domestic relations litigation. *Kulko v. Superior Court, supra,* 436 U.S. 84, addressed the factors that must be considered in evaluating a court's jurisdiction to adjudicate rights to the property of non-resident defendants. The case bears rather extended discussion.

Ezra and Sharon Kulko were married in 1959, and lived in New York City continuously until March, 1972, when they separated. Thereafter, Sharon moved to San Francisco, California. Sharon flew to New York City in September, 1972 to execute a written separation agreement. The agreement provided that the children would reside with their father during the school year and visit their mother during the Christmas, Easter and summer vacations. Immediately after executing the separation agreement, Sharon flew to Haiti and obtained a divorce decree which incorporated the terms of the settlement agreement.

In December, 1973, the Kulkos' daughter decided that she wanted to live with her mother in California. Her father bought her a one-way plane ticket and she took up permanent residence in California. In January, 1976, the Kulkos' son informed his mother that he also wished to live in California. Sharon there-

after sent him a plane ticket and the son, without his father's knowledge or consent, flew to California to live with his mother and sister.

Shortly thereafter, Sharon commenced litigation in California to establish the Haitian divorce decree as a California judgment, modify the judgment to award her full custody and increase her former husband's child support obligations. The trial court denied Ezra's motion to quash, and the California Supreme Court affirmed. (*Kulko v. Superior Court,* 19 Cal.3d 514, 138 Cal.Rptr. 586 (1977).) This Court reversed, finding that Kulko had neither caused an "effect" in California nor purposefully availed himself of the benefits and protections of California laws in a way that would confer jurisdiction upon the courts of this state.

> "The 'purposeful act' that the California Supreme Court believed did warrant the exercise of personal jurisdiction over appellant in California was his 'actively and fully consent[ing] to Ilsa living in California for the school year . . . and . . . sen[ding] her to California for that purpose.' 19 Cal.3d, at 524, 564 P.2d, at 358. We cannot accept the proposition that appellant's acquiescence in Ilsa's desire to live with her mother conferred jurisdiction over appellant in the California courts in this action. A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protection' of California's laws. See *Shaffer v. Heitner,* 433 U.S., at 216." *Kulko v. Superior Court, supra,* 436 U.S. 84, 94 (Footnote omitted.)



The Court's comments are equally applicable to petitioner's conduct in "permitting" his wife to move to this state. Such conduct cannot, under *Kulko,* provide a constitutional basis for jurisdiction over him.

This Court's comments concerning the fairness of conducting the litigation in the California forum are particularly appropriate to this case:

> "[B]asic considerations of fairness point decisively in favor of appellant's State of domicile as the proper forum for adjudication of this case, whatever the merits of appellee's underlying claim. *It is appellant who has remained in the State of the marital domicile, whereas it is appellee who has moved across the continent. Cf. May v. Anderson,* 345 U.S. 528, 534-535, n.8 (1953). Appellant has at all times resided in New York State, and, until the separation and appellee's move to California, his entire family resided there as well. As noted above, appellant did no more than acquiesce in [illegible] stated preference of one of his children to live with her mother in California. This single act is surely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away, and we therefore see no basis on which it can be said that appellant could reasonably have anticipated being 'hailed before a [California] court,' *Shaffer v. Heitner,* 433 U.S., at 216. To make jurisdiction in a case such as this turn on whether appellant bought his daughter her ticket or instead unsuccessfully sought to prevent her departure would impose an unreasonable burden on family relations, and one wholly unjustified by the 'quality

and nature' of appellant's activities in or relating to the State of California. *International Shoe Co. v. Washington,* 326 U.S. at 319." *Kulko v. Superior Court, supra,* 436 U.S. 84, 97-98 (Footnote omitted; emphasis added.)

This Court's decision in *Kulko* highlights important policies which must be considered in any domestic relations case which presents a jurisdictional issue. In essence, this Court has announced in *Kulko* that the courts of California and other states should not penalize non-resident defendant fathers, who continue their relationships with former spouses and children, by asserting jurisdiction over them. The rationale supporting such a policy choice, and the unfairness to a defendant of requiring him to litigate in a state where his former spouse and children reside, is manifest. Is it reasonable, for example, for petitioner, or any other nonresident father who lives apart from his children, to visit them in California only at the risk that such visits will establish jurisdiction over him in subsequent litigation? The adverse consequences of such a rule upon nonresident parents and their children are apparent. Such persons would be subjected to a tremendous penalty simply for maintaining contact with their children residing in another state. Few rules of law imaginable could have a more profoundly adverse impact upon the relationship between parents and their children who reside in different states. (Of course, the same policy considerations apply to the purchase of a California residence for Yolanda and their child, if for no other reason than the parents' obligation to support child and spouse.)

Similar considerations apply to petitioner's activities in coming to California to attempt a marital reconciliation and remaining to discuss the terms of the proposed separation agreement. Reliance upon such activities of defendant in this state as a basis for assertion of jurisdiction over him is inconsistent with the constitutional principles announced by the Supreme Court in *Kulko*. The policy of the law should be to promote free and unrestricted communications between spouses, particularly in situations of marital discord. A decision which penalizes nonresident individuals who, like petitioner, visit their spouses living in another state for any purpose is an unacceptable rule of law. Modern American family life suffers from sufficient pressure already without an adoption by the courts of California of a rule of law which penalizes marital visitation and discussion.



California courts have always demonstrated sensitivity to the policy implications of a decision to assert or decline jurisdiction under the facts of a particular case. *Floyd J. Harkness Co. v. Amezcua,* discussed above, recognizes that the burden which would be placed upon interstate commerce by a decision to exercise jurisdiction in a particular case is one good reason for a court to decline to assert jurisdiction. In a similar vein, *Kulko* demonstrates that due process considerations require that a court decline to assert jurisdiction in situations where assertion of jurisdiction would place severe strain on family relationships.

The Superior Court did not properly evaluate these policy considerations, since it cited as one reason for its decision to assert jurisdiction petitioner's marital and parental contacts with this state. The policies enunciated in the *Kulko* decision demonstrate that the court erred in considering such "contact" as a basis for finding jurisdiction over the petitioner. The court may

not consider as a basis for assertion of jurisdiction over petitioner the fact that he "permitted" Yolanda to come to California to pursue her acting career, "permitted" his daughter Samantha to accompany her mother, provided his wife and daughter with a suitable home in California, established a joint bank account for his wife in California, and visited his wife and child whenever business travel brought him to Los Angeles. Nor may the court consider the fact that petitioner came to California in an effort to reconcile or work out a satisfactory separation agreement with his wife, and initiated negotiations which were deliberately consummated by execution of an agreement in New York with New York attorneys representing both sides. An exercise of jurisdiction on the basis of such contacts would, for the reasons set forth in *Kulko*, be unreasonable and constitutionally impermissible.

Even in the absence of the special policies applicable to domestic relations litigation, the discussions carried on between petitioner and real party in interest in this state would provide no basis for exercise of jurisdiction. These negotiations, even in a commercial litigation context, are inadequate to provide a basis for jurisdiction over petitioner. (*Uible v. Landstreet*, 329 F.2d 467, 470 (5th Cir. 1968).) For example, in *Sibley v. Superior Court*, 16 Cal.3d 442, 128 Cal.Rptr. 34 (1976), the defendant was a resident of California who guaranteed the obligation of a Georgia corporation in order to induce California residents to enter into a transaction with that corporation. The court found that even though the act of sending the guaranty agreement into California produced an "effect" in this state, exercise of jurisdiction would be constitutionally unreasonable.



> "In the present case, the record fails to disclose that petitioner purposefully availed himself of the privilege of conducting business in California or of the benefits and protections of California laws. Likewise, the record does not indicate that petitioner anticipated that he would derive any economic benefit as a result of his guaranty. Although petitioner may have reasonably foreseen that his execution or breach of the guaranty agreement would have some impact in this state, it does not appear that plaintiff Carlsberg assumed any obligations to petitioner which he might have sought to enforce in California. In this regard, contacts with California seem even more minimal than those present in *Belmont Industries, Inc. v. Superior Court* (1973) 31 Cal.App.3d 281 [107 Cal.Rptr. 237] (hg. den.), in which jurisdiction was found to be unreasonable; unlike the present case, in *Belmont*, the nonresident defendant, which had negotiated and contracted with a California corporation for the purchase of certain drafting services, could have sought to enforce its contract in the California courts." *Sibley v. Superior Court, supra*, 16 Cal.3d 442, 447.

Exercise of jurisdiction over petitioner in this case as a result of his activities in connection with the separation agreement would be unreasonable, just as it was in *Sibley*. Petitioner derived no economic benefit as a result of his negotiations in California. Nor did he take advantage of the benefits and protections of California law. (*Cf. Kulko v. Superior Court, supra*, 436 U.S. 84, 97-98 [defendant did not avail himself of the protections of California law by allowing his children to live in this state].)

*Floyd J. Harkness Co. v. Habermann,* 60 Cal.App. 3d 696, 131 Cal.Rptr. 672 (1976), provides an even closer parallel to this case. That litigation, like *Floyd J. Harkness Co. v. Amezcua, supra,* concerned an action to enforce obligations on a series of promissory notes against a resident of Mexico. However, in *Habermann* the defendant was present in California for a certain portion of the negotiations concerning the contracts underlying the promissory notes. Additionally, defendant was physically present in California and had conversations with plaintiff concerning repayment of the notes sued upon. Despite these additional contacts between the defendant and California, the court found assertion of jurisdiction over him constitutionally impermissible because of the burden which would be placed upon interstate commerce by such an exercise of jurisdiction. The court's decision in *Habermann* is fully applicable to this situation.

Nor are petitioner's contacts with California as extensive as those found wanting in *Belmont Industries, Inc. v. Superior Court, supra,* 31 Cal.App.3d 281, 284, 107 Cal.Rptr. 237, 239. In that case a Pennsylvania corporation retained a California drafting company pursuant to a contract negotiated by mail and with respect to a job outside of the state of California. On four or five occasions the Pennsylvania concern had sent representatives to California to discuss other jobs in progress, and on one occasion to negotiate for drafting services on another job. Such contacts were held insufficient to provide a jurisdictional basis.

The mere fact that petitioner entered California for the purpose of negotiating the separation agreement would, even in the absence of the special policy considerations applicable to domestic relations litigation, be



insufficient to provide a basis for jurisdiction over him. (*Cf. Hamilton Bros., Inc. v. Peterson,* 445 F.2d 1334, 1335 (5th Cir. 1971) [assertion of *in personam* jurisdiction must be based upon more than isolated contacts].)

**B. Petitioner's Remaining Contacts With California Are Wholly Insufficient to Support Personal Jurisdiction.**

The overwhelming body of the "contacts" relied upon by respondent in the Superior Court in asserting jurisdiction over petitioner are either irrelevant to the jurisdictional question or may not be relied upon for policy reasons. As a result, there are only two factual matters set forth in respondent's declaration which the court may consider in the jurisdictional analysis. First, prior to 1969, petitioner Kluge owned a home in Beverly Hills. Such ownership was, of course, prior to petitioner's marriage to Yolanda. Additionally, a company owned by petitioner holds a parcel of unimproved real property in Los Angeles County. This real property is, of course, in no way connected with this litigation.

These contacts are wholly insufficient to provide a basis for jurisdiction over petitioner. The fact that petitioner owns property in this state is alone insufficient to provide a jurisdictional basis. In *Shaffer v. Heitner,* 433 U.S. 186 (1977), this Court rejected the "quasi in rem" theory relied upon in earlier decisions as a basis for exercising *in personam* jurisdiction, holding that "[A]ll assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." (*Shaffer v. Heitner, supra,* 433 U.S. 186, 212.) Property ownership in California is only one of a number of factors that must be considered in determining whether jurisdiction

in California is fair and reasonable under *International Shoe* standards. (*Shaffer v. Heitner, supra,* 433 U.S. 186, 214.)

The California Supreme Court's decision in *Cornelison v. Chaney, supra,* 16 Cal.3d 143, 127 Cal.Rptr. 352, demonstrates conclusively the absence of jurisdiction over petitioner Kluge. The defendant in that case was a resident of Nebraska who was involved in a fatal automobile collision with a California resident in Nevada near the California border. The decedent's wife commenced a wrongful death action in California. The court noted the following contacts between defendant and California:

> "For seven years preceding the accident defendant was engaged in the business of hauling goods by truck in interstate commerce. He made approximately 20 trips a year to this state in the operation of this business. The accident occurred while the defendant was en route to California. He was hauling dry milk to the Star Kist Tuna Company in Long Beach, California, and intended to obtain cargo in California for a return shipment to an undesignated destination.
>
> "Defendant was licensed to haul freight by the Public Utilities Commission of California, and had similar licenses issued by the regulatory agencies of several other states. His average cargo in any single trip to California had a value of approximately $20,000. He acted as an independent contractor for several brokerage companies engaged in shipping, one of which was in California." *Cornelison v. Chaney, supra,* 16 Cal.3d 143, 146-47.



The court in *Cornelison* concluded that "defendant's activities in California are not so substantial or wide-ranging as to justify general jurisdiction over him. . . ." (*Cornelison v. Chaney, supra,* 16 Cal.3d 143, 148, 127 Cal.Rptr. 352, 355.) Petitioner Kluge's contacts with California are trivial by comparison with those of the defendant in *Cornelison.* Mr. Kluge has no contact with any regulatory or licensing body in California. While the defendant in *Cornelison* and petitioner both traveled frequently to California, petitioner's visits to California are considerably less frequent than those of the defendant in *Cornelison.* Additionally, this litigation does not arise from such activities. Nor is petitioner an independent contractor or employee of any business located in California, as was the defendant in *Cornelison.* Exercise of general *in personam* jurisdiction over petitioner in California, is impermissible.

Nor is there any basis for exercise of limited jurisdiction over petitioner. This is because none of petitioner's activities that may be considered in connection with the jurisdictional question (ownership of unimproved real property and ownership of a residence ten years ago) pertain in any fashion to the causes of action asserted by respondent. As the court noted in *Cornelison,* the exercise of limited jurisdiction "depends on the quality and nature of [defendant's] activity in the forum in relation to the particular cause of action." (*Cornelison v. Chaney, supra,* 16 Cal.3d 143, 148, 127 Cal.Rptr. 352, 354.) Under such circumstances, reliance upon a limited jurisdiction theory in exercising jurisdiction over petitioner is impossible.

On the basis of all of the foregoing, it is apparent that the Court of Appeal erred in denying the Petition

for Writ of Mandamus. Although conflicts in the evidence must be assumed to have been resolved by the Superior Court in favor of respondent, it should not be forgotten that it was the respondent's burden in the court below to establish, by competent evidence, the factual and legal basis on which a California court might assert jurisdiction over petitioner. (*See, e.g., Watson's Quality Turkey Products, Inc. v. Superior Court, supra,* 37 Cal.App.3d 360, 363, 112 Cal.Rptr. 345, 347, n.2; *General Motors Corp. v. Superior Court,* 15 Cal.App.3d 81, 85-86, 93 Cal.Rptr. 148, 151 (1971).)

## II
## PETITIONER IS NOT FORECLOSED FROM ATTACKING JURISDICTION.

Subsequent to denial of his motion to quash service of summons and complaint in the Superior Court, petitioner sought review of the Superior Court's order in the manner prescribed by California statute. (*See* Cal. Code Civ. Proc., § 418.10(c).) These steps, which consisted of application to the Court of Appeal of the State of California and to the California Supreme Court, were unsuccessful.

Thereafter, petitioner sought a stay of further proceedings in the Superior Court in order to permit him time to file this Petition for Writ of Certiorari. The stay request was grounded upon counsel's knowledge that a resolution of the jurisdictional question by this Court would not be possible prior to the time petitioner would be required to respond to the complaint



in the Superior Court. (Thereafter, and prior to the Superior Court's determination on the motion to stay, petitioner also sought protection against certain discovery requests served by respondent in the litigation, as required by California statute.) The Superior Court denied petitioner's motion for a stay of proceedings, and issued a minute order which, in regard to the later-filed motion for protective order, provided in part as follows:

> "This court does not address the issue of whether defendant [petitioner] has made a general appearance by seeking a protective order from discovery. It is true that such a motion would ordinarily constitute a general appearance under California law—but it is just as reasonable to construe the motion for a protective order as part of a request for stay of all proceedings pending possible certiorari review as it is to view it as a general appearance." Appendix A-6.

Thereafter, petitioner sought a stay of proceedings by this court. Petitioner's stay application directed to Mr. Justice Rehnquist was denied on January 13, 1979. Since denial of that application, petitioner has, as required by time periods prescribed in applicable California procedural statutes, filed a demurrer to plaintiff's complaint, as well as certain motions pertaining to plaintiff's discovery requests.

Petitioner has, at all times and in connection with all pleadings filed in this litigation, constantly indicated his intention ultimately to seek review of the Superior Court's jurisdictional decision by this Court. Under

such circumstances, the jurisdictional question is not moot, as petitioner cannot be deemed to have made a "general appearance" in the litigation which would constitute a waiver of his right to contest the jurisdictional issue. (*Kulko v. Superior Court, supra,* 436 U.S. 84, 90 n.5.) Indeed, it would be anomalous for this Court to hold that petitioner is precluded from asserting his constitutional right to due process of law as a result of the imposition of state rules of procedure which prescribe maximum time periods within which he must respond to the complaint and undertake other actions in connection with the litigation. Petitioner should not be forced to assert his constitutional rights only upon the pain of suffering a default on the merits of the litigation pending against him.

**Conclusion.**

The Court of Appeal's denial of the relief sought by petitioner represents a violation of constitutional principles as established by the courts of California and refined by this Court's recent decision in *Kulko v. Superior Court, supra,* 436 U.S. 84, 93-94. The lower court's ruling can only mean that any non-resident father and spouse who enters California to visit his children or effect a reconciliation with his wife does so at his peril. Such a principle of law is inimical to constitutionally mandated due process policy considerations of promoting harmonious family relationships. It is respectfully submitted that the California Court of Appeal erred in denying petitioner's Petition for Writ of Mandamus and that this Court should accept certiorari and give guidance to lower tribunals concerning the important jurisdictional issues raised by this case as well as those parties vitally affected by the decision of the court below.



Dated: March 2, 1979.

Respectfully submitted,

ROBERT S. WARREN,
RICHARD CHERNICK,
*Counsel for Petitioner.*

BRENT A. WHITTLESEY,
GIBSON, DUNN & CRUTCHER,
*Of Counsel.*

## APPENDIX A.

### Minute Order.

Superior Court of California, County of Los Angeles. November 15, 1978.

Robert Fainer, Judge.

J. Schmuki, Deputy Clerk.

John Lyle, Reporter.

Yolanda Kluge vs. John W. Kluge, etc, et al. C 251985.

Counsel for Plaintiff: Fierstein and Sturman, M. Blumenthal.

Counsel for Defendant: Gibson, Dunn and Crutcher, Robert S. Warren, Richard Chernick, Brent A. Whittlesey.

NATURE OF PROCEEDINGS.

Motion of defendant John W. Kluge, Appearing Specially to Contest Jurisdiction to quash service of summons and complaint or alternatively to dismiss this action on the ground of inconvenient forum (SECOND CONT).

Matter is argued and taken under submission.

LATER:

Motions denied

a. Motion to quash.

(1) Court finds that service of process was proper. CCP Sections 410.10 and 415.40.

(2) Court finds that defendant Kluge has substantial contacts in California as to marital relations, as to parental relations and others. The limited holding of *Kulko vs Superior Court* (1978) .....

US ....., 56 L. Ed. 2nd 132 is not applicable but the broader US Supreme Court decision of *International Shoe Company vs Washington* (1945) 326 US 310, *Hanson vs Denckla* (1958) 357 US 235 and *Shaffer vs Heitner* (1977) 433 US 186 are applicable. There are substantial contacts and in the interest of justice, fairness and due process compel a finding that this court has jurisdiction. The court does not make a determination of defendants residence or domicile.

b. Motion to dismiss (or stay proceedings) under CCP 410.30 are denied. Court finds that the California court is not an inconvenient forum. Plaintiff is a California resident and the majority of the *Great Northern Ry Co. vs Superior Court* (1970) 12 Cal App 3rd 105 factors are found to be affirmatively in favor of the California forum. See also *Henderson vs Superior Court* (1978) 77 Cal App 3rd 583. In so holding, this court makes no determination as to the status of the California property of the parties as either community property or quasi community property.

c. Defendant Kluge to have within 15 days after notice of entry of order denying motions in which to plead to the complaint.

Plaintiff to give notice.

Copy of this minute order mailed by the clerk by USMail.



*Los Angeles, Cal.* Dec 7-1978

TITLE:

/s/ Kluge, S.C.L.A. Co. No. 54976.

PETITION FOR WRIT OF MANDATE DENIED.

I would grant: Stephens, J.

Clay Robbins, *Clerk*

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

I have this day filed Order: Hearing Denied.

*In re:* 2 Civ. No. 54976 Kluge vs. Superior Court, Los Angeles.

*Respectfully,*

G. E. BISHEL
*Clerk*



**Minute Order.**

Yolanda Kluge vs John W. Kluge, etc et al. C 251 985.

Counsel for Plaintiff: Edward Broffman.

Counsel for Defendant: Gibson, Dunn & Crutcher, Richard Chernick.

NATURE OF PROCEEDINGS:

Motion of defendant John W. Kluge, appearing specially to contest jurisdiction, to stay proceedings.

Motion for a stay of proceedings while defendant seeks certiorari to the U.S. Supreme Court is denied. The defendant can seek review of the state courts rulings but it was not the intention of this court, in denying defendant's motion (re jurisdiction, etc) to permit the defendant to delay these proceedings beyond the time it might take defendant to seek appropriate state court appellate review by mandamus, under CCP 418.10. Defendant should seek a stay order from the U.S. Supreme Court. An application for a stay of the decision by the state courts pending petition for certiorari should first be presented to a judge of the state court, but if denied by him, may be presented to a justice of the Supreme Court. *Magnum Import Company vs Coty* (1923) 262 U.S. 159. See also Rules, 27, 50, 51, 1979 Revised Rules of the Supreme Court. 28 U.S.C.A. Section 2101 providing for a stay also provides for conditions and understanding that the court below may impose in granting the stay. Nothing in this order is intended to prevent the parties from agreeing to a stay pending possible U.S. Supreme Court review by certiorari of the state court rulings

but defendant, as a condition of any such stay, should continue to provide plaintiff with support payments. This court does not address the issue to whether defendant has made a general appearance by seeking a protective order from discovery. It is true that such a motion would ordinarily constitute a general appearance under California law—but it is just as reasonable to construe the motion for a protective order as part request for a stay of all proceedings pending possible certiorari review as it is to view as a general appearance.

Plaintiff to give notice.